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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 22

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
T. J. McCARTHY STEAMSHIP COMPANY and
AUTOMOTIVE TRADES STEAMSHIP COMPANY,
Appellants,

vs.

DETROIT AND CLEVELAND NAVIGATION COMPANY,
GREAT LAKES TRANSIT COMPANY and
NICHOLSON UNIVERSAL STEAMSHIP COMPANY,
Appellees

On Appeal from the District Court of the United States
for the Eastern District of Michigan

BRIEF FOR THE T. J. McCARTHY STEAMSHIP COMPANY AND AUTOMOTIVE TRADES STEAMSHIP COMPANY

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OPINIONS BELOW

The opinion of the District Court (R. 82-90) is reported in 57 F. Supp. 81. The decision of Division 4 of the Interstate Commerce Commission (R. 22-25) is reported in 250 I.C.C. 550 and the decision of the full Commission on rehearing (R. 10-19) is reported in 260 I.C.C. 175.

JURISDICTION

The final decree of the three-judge District Court was entered on November 20, 1944 (R. 90). The petition for appeal was presented and allowed on December 18, 1944 (R. 91, 92). Probable jurisdiction was noted on February 26, 1945 (R. 647).

The jurisdiction of this Court is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U.S.C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C. 345).

QUESTIONS PRESENTED

(1) Whether the finding by the Commission under Section 309(c) of the Act certificating a new carrier should be set aside and annulled for failure to make a finding that existing carriers will be unable to obtain equipment and render adequate service.

(2) Whether it is the policy, as declared by the Interstate Commerce Act, to forbid issuance of a certificate to a new carrier in territories or over routes which have in the past been adequately served by existing carriers.

(3) Whether the Commission's findings and conclusions that the transportation service proposed by the McCarthy Companies will be required by present or future public convenience and necessity are supported by the evidence.

(4) Whether the Commission's findings as to the failure of existing carriers to render adequate service in the

past was such as to justify its finding as to public convenience and necessity of service by the McCarthy Companies.

(5) Whether the Commission was justified in broadening the scope of the operating rights requested in the written applications filed by applicants.

STATUTE INVOLVED

The provisions of the Interstate Commerce Act Involved herein are set out in the Appendix, *infra*, pp. 33-85.

STATEMENT

This is an appeal from the decree of a Statutory Court setting aside and annulling the final order of the Interstate Commerce Commission pursuant to its authority under Section 309(c) of Part III of the Interstate Commerce Act (49 U.S.C. 909 (c)) granting to T. J. McCarthy Steamship Company, for itself and as managing agent of Automotive Trades Steamship Company, hereinafter referred to as the "McCarthy Companies," a certificate of convenience and necessity for operating as common carriers in the transportation of motor vehicles between Detroit, Michigan and all other ports on Lake Erie and between Detroit, Michigan, and all ports on Lake Superior.[1]

[1]The companies had agreed that if their applications were granted a single certificate might be issued (R. 12).

The McCarthy Companies are both controlled by T. J. McCarthy (R. 12, 123). They obtained leave to intervene and participated in the District Court case in support of the Commission's order and have joined in this appeal (R. 78-9, 91-3).

The appellees, Detroit and Cleveland Navation Company, referred to herein as "D. & C.," Nicholson Universal Steamship Company, referred to herein as "Nicholson," and Great Lakes Transit Corporation, all operated through the season of 1941 in the transportation of motor vehicles on the Great Lakes as common carriers and at the final hearing before the Examiner of the Interstate Commerce Commission indicated their desire to again engage in this service when the production of automobiles for civilian use was resumed. The appellees opposed the applications of the McCarthy Companies before the Commission (R. 11) and instituted the present suit to set aside and annul the certificate issued by the Commission.

Applications were filed by the McCarthy Companies seeking grandfather rights in pursuance to the regulations of the Interstate Commerce Commission in May of 1941 and amended certificates were filed in October 1941 requesting certificates of public convenience and necessity under the so-called "grandfather" clause of Section 309(a) or under Section 309(c) of the Interstate Commerce Act (49 U.S.C. 909(a), 909(c)) for permission to operate as common carriers by self-propelled vessels in the transportation of motor vehicles between Detroit and Lake Erie ports (R. 10-11).

At the commencement of the hearing, the cases were consolidated and treated as one case. The original proposed report of the Examiner recommended the granting of a certificate for the transportation of motor vehicles as a common carrier on the Great Lakes. Division 4 of the

Commission filed a report (Commissioner Porter dissenting) finding that the facts did not warrant issuance of a certificate of convenience and necessity under either Section 309(a) or Section 309(c) of the Interstate Commerce Act (R. 21-5). Upon petition of the McCarthy Companies, the Commission postponed the effective date of this order and reopened the proceedings for further hearings (R. 11, 26). A further hearing was held at Detroit in June 1943 (R. 399-495) following which there was oral argument before the Commission (R. 506-530). The full Commission then filed its report in March 1944 (R. 10-19).

Because of the irregular route operations set out in the original application, the Commission held that it would consider the applications as requesting authority to operate between Detroit and Lake Superior ports, as well as between Detroit and Lake Erie ports (R. 10-1).

Division 4, in denying the certificate under the "grandfather" clause of Section 309(a) of the Act was upheld by the Commission. The Commission, however, on a review of the evidence previously taken and the evidence adduced at the further hearing found that the proposed service would be required by present and future public convenience and necessity and that the McCarthy Companies were fit, willing and able to perform the service and to conform to the requirements of Part III of the Act and of the rules and regulations thereunder and that such operations would be consistent with the public interest and the national transportation policy declared in the Act (R. 19).[2] A certificate was issued (R. 20-1) and the Commission subsequently denied petitions for reconsideration filed by the present appellees (R. 7-8, 73-4).

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[2]Commissioner Miller wrote his dissenting opinion in which he was joined by three other Commissioners expressing the view that future public convenience and necessity would not require the service proposed (R. 19-20).

The Commission found that the three vessels owned by the McCarthy Companies had been converted into automobile carriers;[3] that prior to 1942 the needs of shippers in such transportation were not adequately taken care of even with the use of the three McCarthy Companies' vessels by one of appellees; that they had been needed in the past; that there was reasonable certainty that they would again be needed when normal production of automobiles was resumed (R. 13-4, 17); that the McCarthy Companies had retained the most of their equipment which had been removed for conversion of the vessels back to bulk carriers for the transportation of grain and iron ore during the emergency and that the McCarthy Companies can convert the vessels back into automobile carriers without delay when needed for the transportation of automobiles (R. 12-17).

The Commission, in its report, deals in some detail with the changed conditions of the appellees due to the requisitioning and purchase by the Government of vessels from all three of the appellees and the conversion of former automobile carriers to bulk carriers (R. 15-6); the delays in the movement of automobiles by water between Detroit and other ports in 1940 and 1941 resulting in numerous complaints to the motor car manufacturers and the actual diversion of traffic to motor carriers (R. 14) and the uncertainty as to the time required for appellees to procure and place in operation vessels for the transportation of automobiles sufficient to adequately handle the traffic offered following the resumption of the manufacture of automobiles for civilian use (R. 17).

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[3]One of the vessels, the GEORGE W. MEAD, had been slightly changed, the other two vessels having been converted from bulk vessels to automobile carriers (R. 127) and had been used in the transportation of automobiles for a considerable period and having transported a high percentage of all automobiles transported by the D. & C., which company had had them under charter (R. 12-14).

The District Court set aside and annulled the Commission's certificate primarily on the basis that the evidentiary findings of the Commission did not support the ultimate conclusions of the Commission as to public convenience and necessity. The Court stated that there was no need for it to give detailed consideration to the record before the Commission and that it would confine itself mainly to the facts developed in the report (R. 83-4). The Court apparently was of the view that it was essential for the Commission to find that appellees would be unable, upon the resumption of the manufacture of automobiles for civilian use, to procure tonnage for the transportation of motor vehicles adequate to meet the anticipated demands.

The Court further found that the Commission's evidentiary findings are insufficient to support its ultimate findings that future public convenience and necessity will require the transportation service proposed by the McCarthy Companies (R. 87). The Court also rejected as "conjectural" the Commission's conclusion that the public interest would be adversely affected if, upon the resumption of automobile production, appellees delayed in acquiring the needed automobile tonnage (R. 88).

The Court further declared that "to introduce new and competing carriers into a field adequately served * * * collides with the clearly defined purpose of the Transportation Act already indicated" (R. 88), which "clearly defined purpose" refers to an excerpt from *Texas & Pacific R. R. Co. v. Gulf, Colorado & Santa Fe R. R. Co.*, 270 U. S. 266, quoted in the Court's opinion (R. 82-3).

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*The Court would appear to substitute its judgment for that of the Commission as to the adequacy of the service in view of the Commission's finding (R. 14) that cars were delayed two to four days and actually removed from the premises of appellees and shipped via motor truck because of the complaints of the receivers. The Court likewise apparently came to the conclusion, not justified by the record and the findings of the Commission, that these delays only occurred during the peak period (R. 88).

Here we believe it appropriate to call particularly to the attention of the Court some of the evidence before the Commission as the Commission in its report necessarily did not state in detail all of the evidence before it. A brief summary of some of this evidence should meet appellees contention (R. 6) that the Commission's findings as to convenience and necessity are "unsupported by evidence."

Automobiles were moved on the Great Lakes by conventional automobile carriers, combination passenger and freight vessels and on the decks of bulk vessels through 1940. Most of the bulk vessels were used in transporting to Lake Superior ports (R. 535, 549) but only a very small percentage of automobiles transported via vessel from Detroit were to Lake Superior ports ("Exhibit No. 2," R. 594). The bulk vessels were not available in 1941 and it was then apparent that there would be a shortage of available tonnage (R. 224-5). With service discontinued to Milwaukee and an additional carrier in service to Duluth, there were not sufficient vessels to handle the transportation to Lake Erie and Lake Superior ports (R. 225). The D. & C. passenger and package freight vessels transported a relatively small percentage of the new automobiles from the Detroit area. The amount of their capacity for new automobiles was restricted due to tourist automobiles (R. 106). Automobile carriers handle by far the larger portion of motor vehicles transported on the Great Lakes.[5]

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[5]During 1939, 1940 and 1941, respectively, 64%, 74% and 71% of the automobiles transported by D. & C. were on the vessels chartered by it from applicant (R. 17). The D. & C. had a fourth automobile carrier which did not transport tourist automobiles, but only new cars. The testimony in the present case indicates that the three appellees and the Minnesota Atlantic Transit Company, which was acquired in 1941 by Great Lakes Transit Corporation, prior to 1941 transported a large bulk of the automobiles.

T. J. McCarthy, President and principal stockholder in the McCarthy Companies, was associated with D. & C. in the capacity of solicitor from 1933 to 1941 and was in charge of the automobile division and dealt with the automobile shipping public (R. 128, 231-2, 242, 291). He was under agreement to devote his entire time to the business for which he received, as sole compensation, a commission based upon a percentage of the gross freight earned, it being his obligation to pay all expenses in connection with solicitation.[6] The agreement which by its terms was to expire at the close of the navigation season in 1942 was cancelled by mutual consent in February 1942 (Exhibit No. 22, R. 313-5). Through the season of 1941 D. & C. operated six combination passenger and freight vessels and four automobile vessels (R. 490, 540). All of the automobile vessels had been placed in service because of the solicitation efforts of Mr. McCarthy and three of the vessels were owned by the McCarthy Companies and were under charter to D. & C. (R. 106, 178). D. & C. had acquired, through Detroit and Cleveland Steamship Company, a wholly owned subsidiary, one carrier in 1934, but flatly refused later to invest in vessels to fill the growing need of Mr. McCarthy's solicitation (R. 178-80, 223, 279-80, 288, 292; Exhibit No. 23, R. 316-20).

To transport the automobiles which his solicitation had developed, three vessels were purchased by the McCarthy Companies, one of which had previously been used in the transportation of paper and tractors and was equipped with between decks and two others which were conventional bulkers and were converted at a cost of approximately $40,000.00 each. The MEAD was chartered to the D. & C. at the commencement of the 1936 season, the

[6]Exhibits 13, 15, 18, 19; R. 298-300, 302-4, 306-9. Offices were maintained for soliciting traffic from Detroit, Cleveland, Buffalo, New York, and Philadelphia (R. 176).

TREMAINE at the commencement of the 1937 season and the INGALLS commencing with the 1940 season.[7]

D. & C. did not convert its one automobile carrier into a bulk boat in the winter of 1941-1942, but simply laid it at the dock and it was subsequently requisitioned by the War Shipping Administration and sent to salt water for conversion for service there (R. 292, 540; Exhibit No. 33, R. 495). The Government also requisitioned one of the companies' large passenger steamers and converted it into an aircraft carrier (R. 477). D. & C. has not owned an automobile carrier since that time and following the termination of the agreement between the McCarthy Companies and the D. & C. has had no agreement of any kind with them by way of option or otherwise (R. 188; Exhibits No. 21, 22, A. 311-5).

The Examiner before whom the further hearing was held in June of 1943 permitted testimony of the General Manager of the D. & C. that he had been advised by the President that it was the plan of the D. & C. to equip itself, after the war, with automobile carrying vessels the equivalent of its former facilities (R. 489-90, 491-2).

Through 1941, Nicholson operated a fleet of twelve boats of which four were automobile carriers, the other eight being conventional bulk vessels which were sometimes used in transporting automobiles on deck to Lake Michigan and Lake Superior ports (R. 534-5). Five of the bulk vessels were chartered by Nicholson and the charters were not renewed after 1941 (R. 557). At the further hearing in June of 1943, it was operating nine vessels of which five, including all four of its former automobile carriers, were

[7] R. 107, 176, 189-90; Exhibits No. 17, 20, 21, 22, R. 305-6, 309-10, 312, 314.

owned by the Government and engaged in the transportation of bulk commodities (R. 407, 482-3).[5]

The Great Lakes Transit Corporation had operated on the Great Lakes since 1916 in the package freight trade. At the end of 1941 it had fourteen vessels, including one vessel equipped for the carrying of automobiles (R. 438-40, 442). It was never a real factor in the transportation of automobiles. In 1940, it transported less than 10% of approximately 263,000 of the automobiles transported by water alone from Detroit (R. 444, 594). In 1942 all of this company's vessels were requisitioned and removed from the Lakes for conversion into salt water ships (R. 437, 463; Exhibit No. 33, R. 495). This company offered testimony at the further hearing in June of 1943 that it intended to resume its former business when this should become possible, but admitted that no definite plans had been made (R. 439-40, 451).

Following the close of the testimony in June of 1943, it came to the attention of the attorney for the McCarthy Companies that four of the vessels which had been taken to the Gulf had been returned to the company and this fact was called to the attention of the Commission on brief and was confirmed by Great Lakes Transit Corporation counsel (R. 16). It has now come to the attention of counsel for the McCarthy Companies that these four vessels were later sold by Great Lakes Transit Corporation for transfer to alien flag and that the company presently owns no vessels. The McCarthy Companies, on the other hand, are in a position to reconvert their vessels to auto-

[5]Its former automobile carriers were the WOODRUFF, later named the FRED L. HEWITT (R. 258), SONOMA, CORALIA and CRESCENT CITY (R. 534). Its only other vessel with substantial automobile carrying capacity was the PENOBSCOT (R. 535). These five boats were all purchased by the Government and converted into bulk vessels (Exhibit No. 33, R. 495-6).

mobile carriers on short notice despite the fact that they have previously been engaged in the transportation of grain and iron ore (R. 188, 409). The vessels were used in the bulk trade in 1942, in 1943 the two larger vessels towing grain barges. It did have deck space for motor vehicles and in 1942 transported 950 trucks between Detroit and Buffalo for the Army (R. 402).[9] These vessels are owned free and clear of any liens and the steel beams, timbers and other equipment has been preserved so that they may be readily converted into automobile vessels (R. 403). The vessels were, as were most other automobile carriers, obsolete as bulk carriers during normal times and could not be profitably operated as bulk vessels (R. 405).

Witnesses representing manufacturers producing the bulk of the automobiles in Detroit testified as to the need in the future of the proposed service of the McCarthy Companies (R. 17). This testimony further disclosed that during 1940 and 1941 there were delays of two to four days in transporting automobiles from Detroit to Buffalo and Cleveland which caused a congestion at the docks at Detroit, many complaints and actually resulted in diversion of automobiles from water carriers to motor truck carriers.[10]

Mr. Brennan of the Chrysler Corporation testified that where automobiles were delivered to water carriers for shipment and not promptly shipped it was necessary to find other means because of its lack of space at the com-

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[9]This service was performed under temporary authority of the Commission (R. 13) and has been renewed and is still operating under the Second War Powers Act (as amended by the Act of December 20, 1944, 58 Stat. 827, U.S.C.A. Supp., Title 50, Sec. 645). The present temporary certificates expire on December 31, 1945.

[10]R. 14, 227, 233, 235, 238, 240, 243-4, 246-7, 254, 256, 268-71, 276, 434.

pany plants to store more than two days' production (R. 227). The testimony of numerous witnesses was to the effect that had the three McCarthy vessels not been available for the transportation of automobiles in 1941 that the facilities of the appellees would have been inadequate.[11]

SPECIFICATIONS OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that the evidentiary findings of the Commission do not support the ultimate findings and conclusions of the Commission as to public convenience and necessity.

(2) In substituting its judgment for that of the Commission upon truly administrative matters.

(3) In holding that the decision of the Commission is based upon too many assumptions and suppositions to be sound as a matter of law.

(4) In holding that the effect of the Commission's findings and order is to introduce new and competing carriers into a field adequately served, without the definite need for the service being shown.

(5) In holding that the shipping tonnage available before the emergency will again be available when the emergency passes.

(6) In concluding that the Commission made its determination as to public convenience and necessity almost solely on the grounds advanced in support of a certificate under the "grandfather" clause.

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[11] R. 221, 228, 234, 237, 246, 259, 271, 277, 434-5.

(7) In holding as conjectural the conclusion of the Commission to the effect that public interest will be adversely affected if the protestants (appellees) are delayed in acquiring additional shipping facilities after the production of automobiles is resumed.

(8) In concluding that the order of the Commission was illegal and void and should be enjoined, set aside and annulled.

(9) In failing to dismiss the complaint.

SUMMARY OF ARGUMENT

For the purpose of clarity, the same numbered headings will be used in the summary of argument as are used in the argument of this brief, although the individual subheadings will not be repeated.

I.

A. From a complete reading of the opinion of the Court below, it would appear apparently that the Court undertook to and did substitute its judgment for that of the Commission. The Court clearly stating (R. 83): "The question of law submitted to the Court is that the action of the Commission was not supported by evidence." The Court then proceeded on an entirely different theory. It admittedly, without a review of the evidence before the Commission, set aside and annulled the order of the Commission.

B. The Court below placed a very narrow interpretation upon the policy of the Act and in doing so clearly went *contra* to the rulings of this Court. This Court in *Chesa-*

peake & Ohio Railway Co., v. United States, supra, said at page 42:

> "In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest."

Should the Commission follow the reasoning or policy of the Court below, it would be well nigh impossible to ever authorize a new transportation and appellees would, in effect, by obtaining their certificates have conferred upon them proprietary or exclusive right or rights in the use of the public waterways (the Great Lakes) in direct violation of Section 309(e) of the Act. See Appendix.

II.

The Court below, because of certain recitations made by the Commission in its report, came to the conclusion that the certificate of public convenience and necessity was granted primarily on evidence offered in support of the "grandfather" application. The testimony going to the failure of the then existing carriers to perform a proper or adequate service was all offered after an amended application had been filed seeking a certificate of convenience and necessity. The Commission was definite in pointing out that the McCarthy Companies had no "grandfather" rights, affirming Division 4 in that regard. It is submitted that under all of the evidence the Commission was clearly justified in finding a present need for service between Detroit and Lake Erie ports and a future need for service between Detroit and Lake Superior ports.

III.

In view of the testimony as to the failure of existing carriers to render an adequate service, the Commission was justified in its findings of public convenience and necessity and in the issuance of certificates to the McCarthy Companies. The Commission had before it the testimony that there had been long delays in forwarding automobiles from the docks of the existing carriers. There were many complaints from shippers and the situation became so acute that on a number of occasions automobiles were actually removed from the existing carriers' docks and shipped to destination via other means. The Commision, under the broad authority conferred upon it, certainly had the right to conclude that a new carrier should be certificated and that it was in the public interest that this be done.

IV.

It is submitted that from all the testimony adduced and from the amendments made in the applications that the Commission was justified in broadening the scope of the application to include operations between Detroit and Lake Superior ports. A great deal was made of this argument in brief before the Court below. It is submitted that the Court below was correct in saying (R. 89):

> "In view of the wide latitude accorded the Commission in regulating its procedure and freeing it of the technical requirements of pleadings and proofs, and the failure adequately to show prejudice, we are not persuaded that the order of the Commission, if valid, is too broad."

ARGUMENT

I.

THE FINDINGS OF THE COMMISSION JUSTIFY THE ISSUANCE OF A CERTIFICATE OF CONVENIENCE AND NECESSITY, IT NOT BEING NECESSARY FOR THE COMMISSION TO FIND THAT APPELLEES WILL NOT BE ABLE TO OBTAIN NECESSARY EQUIPMENT TO MEET FUTURE SHIPPER DEMANDS

A. Under the statute the Commission is given broad administrative discretion in determining convenience and necessity and in the granting of a certificate in the public interest and the Court should not substitute its judgment for that of the Commission.

It is apparent that the District Court has made a determination that it was incumbent upon the Commission to make a finding that the appellees will not be able to obtain the required facilities which the Commission has found they will need to meet the demands for the transportation of automobiles when their production is resumed and in the absence of such a finding there is no basis for the conclusion that the service of the McCarthy Companies will be required by future public convenience and necessity. This is clearly substituting the Court's judgment for that of the Commission and doing so on the narrow basis of the Commission's own findings and without a review of the testimony on which the Commission's findings and conclusions are based.

The Commission certainly had the right, from the prior refusal of D. & C. to invest any of its money in vessels, to come to the conclusion that there might be delay in that company acquiring facilities. The Commis-

sion had before it the clear testimony that the McCarthy vessels were available and that the equipment for their reconversion to automobile carriers had been saved and that the vessels could be converted back to automobile carriers with comparatively little delay. We contend that the clear language of Section 309(c) of the Act authorized the Commission to determine the question before it and that the Commission was justified, under the proofs, to grant the certificate and that the District Court in its opinion has interpreted the power of the Commission under this section in such a way as to clearly limit the power of the Commission. The construction is entirely too narrow and does not find support under the cases of this Court. Literally, the Court has said that future public convenience and necessity can never be found by the Commission without the Commission first determining that it is not possible for the existing carriers to perform the contemplated service. This presumably where the service has been inadequate in the past and under the normal conditions existing in the past, appellees did not render good service in 1940 and 1941.

The provisions of Part III of the Act have their counterpart in Part II which relates to motor carriers, the comparative provisions being Sections 206 and 207 of the Act (49 U.S.C.A. 306, 307). The Act was amended in 1940 and Section 1(18) of the Act relates to the extension of a line of a railroad or constructing a new railroad line.

Congress has granted to the Commission very broad authority to determine questions of fact and to grant certificates on a showing of public convenience and necessity and in the public interest and to carry out the national transportation policy as expressed in the Act. This Court has recognized this broad discretion for a

good many years. In *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 111, the Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

This case has been widely quoted and under the clear language of the case it would appear that the District Court was in error in setting aside and annulling the Commission's order without reviewing the testimony on which the Commission's findings and conclusions were based.

In the recent case of *Interstate Commerce Commission v. Parker*, 65 Supreme Court Reporter 1490, the Court said at page 1493:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell v. United States*, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean*

Trucking Co. v. United States, 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

In *Barrett Line, Inc., v. United States*, 65 Supreme Court Reporter 1504, this Court made it plain that it would not substitute its judgment for that of the Commission in refusing to issue a certificate for a new operation by a water carrier and stressed the broad power of the Commission in relation to such applications.

The Court pointed out in *Texas & Pacific Railway Company v. G. C. & S. F. Ry. Co.*, 270 U. S. 266, at page 73, the functions of the Commission in dealing with public convenience and necessity for an extension of the railroad's line.

In the later case of *Chesapeake & Ohio Railway Company v. United States*, 283 U. S. 35, the Court said at page 42:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question."

A reading of the opinion of the District Court in the present case clearly demonstrates that that Court has not only placed a very narrow construction upon Section 309(e), but has attempted to limit the functions of the Commission. The Commission had before it the undisputed testimony that the appellees in 1941 had not performed what in their judgment was an adequate transportation service. The record is plain that there were unreasonable delays to Lake Erie and Lake Superior

ports in the shipment of new automobiles; this despite the fact that service had been discontinued to a principal Lake Michigan port (Milwaukee) in September 1941 and an additional carrier (Nicholson Transit Company) later held to be a common carrier was operating to Lake Superior ports; that there were numerous complaints about the delays and instances where motor vehicles were actually removed from the premises of the appellees and shipped by means of the motor truck to their destination.

The District Court admittedly, without reading the record, comes to an opposite conclusion from the Commission and actually holds that there was adequate service by existing carriers. The Commission, after a recitation of the facts, including the inadequacy of the service, concludes that public convenience and necessity and the public interest justify the issuance of a certificate.

The Court below clearly stated the question of law submitted to the Court saying (R. 83):

> "The question of law submitted to the court is that the action of the Commission is not supported by evidence."

This was the sense of the bill of complaint. The Court, nevertheless, points out:

> "The plaintiffs (appellees here), however, rest their case upon the evidentiary findings of the Commission, and submit the proposition that these findings do not support the ultimate finding and conclusion of the Commission as to public convenience and necessity."

The Court then says:

> "There is, therefore, no need for the court to give detailed consideration to the record made before the Commission, and we confine ourselves mainly to the facts developed in its report."

The Court then proceeds to place its own construction upon Section 309(c) by concluding that it is the policy of the Interstate Commerce Act to forbid new competition in any field which has been adequately served by the existing carriers (R. 88). We here respectfully state that the Court below did not give proper consideration to pertinent findings of the Commission in its report, but on the other hand ignored specific findings wholly justifying the ultimate conclusions of the Commission.

B. It is not the policy, as declared by the Act, to prohibit new carrier operations in every instance in which the past service of present carriers has been adequate.

It is believed that the Court is clearly wrong in placing so narrow a construction on Section 309(c). The Court, by placing its own interpretation upon the policy of the Act, raises the further question as to whether a certificate of public convenience and necessity would ever be proper with existing carriers giving adequate service. This Court in *Chesapeake & Ohio Railway Company v. United States, supra,* said at page 42:

> "In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest."

The Court further pointed out in the same case (pp. 42-43) that that portion of the Act relating to consolidation of railway properties "clearly discloses a policy on the part of Congress to preserve competition among carriers." It is contended that the foregoing views apply with equal force to motor carriers under Part II of the Act and

water carriers under Part III of the Act. Either are prohibited from commencing new operations without a certificate from the Commission on a finding of public convenience and necessity. It is not reasonable to assume that Congress intended to give to existing motor and water carriers more protection against any competition than it gave to the railroads. There is nothing in the Transportation Act of 1940 which would lead one to believe that there has been a change in the policy of Congress respecting new competition.

If the reasoning of the lower court was carried to its ultimate conclusion, there would have to be a breakdown in the transportation service in any particular field before a certificate could be issued to a new carrier. The clear language of 309(c) would appear to refute any such contention.

The McCarthy Companies had contracts with the D. & C., one of the appellees, who had no investment in the vessels and who requested and obtained a cancellation of the charters and solicitation agreement when it was thought that there would be no motor vehicles to transport in 1942. It is difficult to see how the investment of the appellees in their own equipment could be damaged or impaired by the McCarthy Companies operating their own vessels instead of having them operated by one of the appellees. While automobile vessels do require a substantial investment, it is not as permanent nor does it involve such large expenditures as an extension of railroad facilities by new construction.

The General Manager of the D. & C. was careful to say that they would furnish facilities as in the past and the witness on behalf of Nicholson spoke of using the decks of other vessels not owned by it, which practice was discontinued after Part III of the Act became effective

(R. 224-5). The Great Lakes Transit Corporation no longer has any vessels. The policy of the Commission with respect to certifying new carriers is familiar to the Court, the Court having considered two such cases in the October Term of 1944. We refer to *Interstate Commerce Commission v. Parker*, *supra*, and *American Trucking Association, Inc., v. United States*, 65 Sup. Ct. Rep. 1499.[12]

If the Commission should follow as a policy the ruling of the District Court then existing carriers might well claim exclusive right of ways over certain water routes prohibited by Part III of the Act. Any common carrier under the Act, whether rail, motor or water, is privileged or authorized to continue service, but this in nowise works as a limitation upon the authority of the Commission to grant similar rights or to introduce new carriers as they are required by public convenience and necessity and in the public interest. *Pennsylvania R. R. Co. v. United States*, 40 F. 2d 921, 925 (W.D. Pa.); *Indian Valley R. R. v. United States*, 52 F. 2d 485, 487 (N.D. Calif.). Cf., *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 219, (E.D. Pa.), affirmed 317 U. S. 587.

II.

THE COMMISSION WAS JUSTIFIED IN ITS CONCLUSION ON THE QUESTION OF PUBLIC CONVENIENCE AND NECESSITY AS THIS CONCLUSION COULD REASONABLY BE REACHED ON THE EVIDENCE OF RECORD

The District Court apparently arrived at the conclusion that although a certificate of public convenience and necessity was issued that this was done primarily on a showing

[12]The Commission in *American Trucking Association, Inc., v. United States*, *supra*, actually rejected evidence offered to show the economic effect on existing carriers if the new operating rights were granted.

made on the "grandfather" feature of the application. The Commission pointed out in its report, affirming Division 4 in its denial of "grandfather" rights, what it considered to be the pertinent testimony on which to grant a certificate of public convenience and necessity.

Upon Division 4 denying the application, a petition for further hearing, reconsideration and oral argument was filed and the full Commission postponed the effective date of the order and granted a rehearing presumably because of the showing made as to the changed conditions between the time of the original hearing and the decision of the Commission. At the time of the further hearing, the Great Lakes Transit Corporation had none of its fourteen ships. The D. & C. had lost one of its combination passenger and freight vessels, as well as its only automobile carrier and had terminated, by mutual consent, its charter arrangement on the three McCarthy boats. Nicholson had voluntarily sold all of its former automobile carriers and had terminated the charters on vessels which it had operated in 1941 and with the production of motor vehicles greatly curtailed the appellees had not had the facilities to even transport the limited number which the armed services needed to move between Detroit and Buffalo. This was, no doubt, the basis of the Commission's findings that there was a present need for the operation between Detroit and Lake Erie ports (R. 14). The testimony as to when any of these carriers could obtain vessels for transportation of motor vehicles was highly speculative although the record was clear that the McCarthy Companies were then rendering and had rendered transportation service and were in a position within a very short time to have their three vessels reconverted and placed in that trade.

It would appear that the District Court, when its opinion is read in its entirety, clearly undertakes to draw

conclusions and weigh the evidence and arrive at a different answer than did the Commission, all based upon, as it states, the evidentiary findings of the Commission as contained in its report and not upon the evidence which was before the Commission and from which it made its findings and conclusions. One of the questions which the District Court has raised by its opinion is whether the Commission has the authority under the Act to come to a conclusion that public convenience and necessity in the public interest may require facilities adequate to meet future transportation needs and if they should so decide whether the Court may set aside their order on the basis that it was conjectural.

The language used in the Act has been in certain State Acts for many years and Congress will be assumed to have known its meaning. The Commission is to determine what "will be" required by "future" public convenience and necessity. Division 5 of the Commission in *Arco Auto Carriers, Inc., Extension—Kenosha-Racine, Wis.*, not printed, but cited in the report of the full Commission (R. 18) in granting a certificate to the McCarthy Companies said:

> "While the curtailment in the production of automobiles during the national emergency results in a temporary diminution in the demand for the transportation of such commodities, it has not been our policy to deny an application because of the changed conditions resulting from the war, if the evidence otherwise supports a grant thereof. Normal conditions including the demand heretofore experienced are bound to recur and applicant should not then be expected to incur the cost and delay of a further proceeding."

We believe it reasonable to suppose that members of the Commission were familiar with the facts developed in *New*

Automobiles in Interstate Commerce, 259 I. C. C. 475. In that case an exhaustive study was made by the Commission on the movement of new automobiles and there the Commission pointed out the heavy movement by water and the reasons for it. It is submitted that under the record made the Commission was wholly justified in granting the certificate; that there was "a rational basis" for the conclusion of the Commission and that the order of the Commission being supported by proof it is not within the province of a Court to proceed in the matter as "the judicial function is exhausted." See *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 146.

The District Court, by setting aside and annulling the order and certificate of the Commission, has squarely presented to this Court the question as to whether the language "will be" and "future," as used in the Act, have any meaning or are mere surplusage. The case was exhaustively briefed and argued with appellees here as protestants and a petition for reconsideration of the final determination of the Commission was denied. It is submitted that the Commission, under the proofs, was clearly within its rights in ordering the certificate on the basis of public convenience and necessity and in the public interest.

III.

THE COMMISSION'S FINDINGS AS TO THE FAILURE OF THE APPELLEES TO RENDER ADEQUATE SERVICE IN THE PAST ARE IN THEMSELVES AMPLE TO SUPPORT ITS FINDINGS OF PUBLIC CONVENIENCE AND NECESSITY AND OF THE CERTIFICATE ISSUED TO THE McCARTHY COMPANIES

The Commission on all of the testimony, including testimony offered by certain of the appellees in the Nicholson Transit Company Case (M-732) which was incorporated

by reference, made the finding that appellees had not provided adequate service. The Commission in its findings said (R. 14):

> "In 1940 and 1941, there were delays ranging from 2 to 4 days in the loading of the automobiles from the docks at Detroit incident to the congestion of such traffic and the inability of the water carriers to handle it promptly, which caused delays in delivery at final destination and resulted in numerous complaints from automobile dealers and distributors. Because of such delays, it was necessary at times to move by motor truck automobiles which had been previously delivered to the docks at Detroit for water transportation."

There is evidence in the record to support these findings. It should be borne in mind that the McCarthy vessels were under charter to appellee D. & C. during the season of 1941. Even with these vessels available and in the proposed service, there were not ample vessel facilities to meet the shipping demands of the public. This despite the fact that appellees, Nicholson and Great Lakes Transit Corporation, apparently in an attempt to serve Lake Erie and Lake Superior ports had discontinued service to Milwaukee, Wisconsin. The Commission further said (R. 17):

> "At certain times during the period prior to 1942, there were insufficient vessels, including applicants' vessels, fully to meet the needs of shippers of motor vehicles *and similar situations may likely arise at such times in the future after the war upon the resumption of normal production of motor vehicles.*" (Italics supplied.)

Following the passage of the Transportation Act of 1940, a large number of the so-called bulk operators would no longer transport automobiles on the decks of their vessels to the head of the Lakes (R. 224-5). They had formerly transported cars for other carriers, particularly appellees

Nicholson and Great Lakes Transit Corporation. In 1941, the Nicholson Transit Company entered this field and its application was bitterly protested by appellee Nicholson Universal Steam Company.[13]

Congress clearly intended that the National Transportation Policy should be to promote "adequate" service and to develop a national transportation system "adequate to meet the needs of the commerce of the United States." The Commission had a right to conclude from all of the evidence that appellees had not furnished facilities adequate to meet the needs of the shippers prior to 1942 and in all probability would not furnish them at some later date despite their declared intentions of doing so.

The Commission doubtless had in mind that while it might well be to the advantage of appellees to have automobiles waiting on their docks to be transported with their vessels all fully loaded during the production season, it was not in the public interest for shippers to be required to await the convenience of appellees for the shipment of their automobiles, and on occasions to actually have to divert their traffic to other means of transportation because of the failure of appellees to transport them with reasonable dispatch resulting in numerous complaints from consignees.

From all of the evidence produced and after argument before the full commission at which counsel for the McCarthy Companies and all three of the appellees participated, the full Commission, after a rather full recital of the facts, stated (R. 19):

"We further find that the present and future public convenience and necessity require operation

[13]These companies are not connected financially in any way, William Nicholson, President of the present Nicholson Transit Company, having been one of the organizers of the original Nicholson Transit Company later merged with the Nicholson Universal Steamship Company.

by applicants as common carriers by water of motor vehicles by self-propelled vessels in interstate or foreign commerce between Detroit and Lake Erie ports and between Detroit and Lake Superior ports; that applicants are fit, willing and able properly to perform such operations and to conform to the requirements of Part III of the Act and of our rules and regulations thereunder; and *that such operations will be consistent with the public interest and the national transportation policy declared in the act.*" (Italics supplied.)

It is submitted that the matter was fully heard before the Commission and that the issues were sharply in dispute. Shipper testimony, with the exception of two dealers who had been served by appellee Nicholson, was all to the effect as to the need of the service. The Commission found from actual operations in 1942 that there was a present need for the service between Detroit and Lake Erie ports (R. 14). This was no doubt based upon the actual movement during that year of some 950 motor vehicles for the army which appellees admittedly did not have the facilities to move. The conclusion of the Commission as to future need to Lake Superior ports was in its sound administrative judgment and, therefore, should not be set aside and annulled. There certainly is rational basis for the conclusions of the Commission and where this exists its findings and conclusions should not be disturbed. *Rochester Telephone Co. v. United States*, 307 U. S. 125, 146. See also *Chesapeake & Ohio Railway Co. v. United States*, 283 U. S. 35, 42; *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88.

IV.

THE COMMISSION WAS JUSTIFIED ON THE RECORD IN GRANTING AUTHORITY TO THE McCARTHY COMPANIES TO OPERATE TO LAKE SUPERIOR PORTS

At the original hearing of the applications in Washing-
on in September 1941, certain of appellees objected to any
estimony on public convenience and necessity on the
rounds that such testimony could not be offered under an
pplication based on "grandfather" rights (R. 132). Sub-
equently, amended applications were filed and at the open-
g of the adjourned hearing at Detroit, motion was made
amend the application to include, in addition to the ports
etween Detroit and Lake Erie ports, transportation over
e irregular routes shown in Automotive Trades Steam-
ip. Company's amended application. Unfortunately,
rough stenographical error, reference was made to Ex-
bit 20 rather than 27 which showed these routes, or more
roperly speaking the ports between which cargoes had
en transported (R. 169-70, Exhibit No. 27, R. 326-7).

No objection was made at that time by any of the pro-
stants although they all had been given copies of the ex-
bit. That all of the parties knew that the McCarthy
mpanies claimed that the application had been broad-
ed was borne out by the oral argument before Division 4
. 22).

At the rehearing granted by the Commission at which
ther proof was taken it was stated explicitly that the
Carthy Companies sought authority to operate between
troit and Lake Superior ports (R. 410-11, 41 . 427). Ap-
lees offered extensive proof in opposition to Lake Supe-
not only by the incorporation into the record of the
imony taken in the Nicholson Transit Company Case

(W-732), but at the further hearing (R. 536-46, 548-51, 593-6, 599-601). The full Commission, in its report, authorized operations to Lake Superior ports (R. 11-12). In the oral argument and on brief before the District Court the broadening of the application was stressed. The Court, however, stated (R. 89):

> "In view of the wide latitude accorded the Commission in regulating its procedure and freeing it of the technical requirements of pleadings and proofs, and the failure adequately to show prejudice, we are not persuaded that the order of the Commission, if valid, is too broad."

CONCLUSION

It is submitted that there was substantial proof as to the need of the services of the McCarthy Companies and that there was a rational basis for the findings and conclusions of the Commission and that, therefore, the decree of the District Court setting aside and annulling the order of the Commission should be reversed and the District Court directed to dismiss the complaint.

Respectfully submitted,

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Attorney for Appellants T. J. McCarthy Steamship Company and Automotive Trades Steamship Company.

FOSTER & LOTT,
Of Counsel.

APPENDIX

The Transportation Act of 1940, 54 Stat. 899, inserts before Part I of the Interstate Commerce Act the following declaration of National Transportation Policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 309 of Part III of the Interstate Commerce Act, as enacted by the Transportation Act of 1940, 54 Stat. 941, 49 U. S. C. 909 (a), (b), (c), (e), provides in part as follows:

> (a) Except as otherwise provided in this section and section 311, no common carrier by water shall

engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in *bona fide* operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in *bona fide* operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *

(b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent

authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

* * * * *

(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways.